

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-6152

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., MISERICORDIA
HOSPITAL MEDICAL CENTER, BUFFALO GENERAL HOSPITAL, THE
GENESEE HOSPITAL, and THE MOUNT SINAI HOSPITAL, on
behalf of themselves and all other nonprofit hospitals
which are members of the HOSPITAL ASSOCIATION OF NEW
YORK STATE, INC., and which are reimbursed for Medical
aid Services rendered to hospital patients,

Plaintiffs-Appellants,

—v.—

PHILIP L. TOIA, as Commissioner of Social Services of the
State of New York, ROBERT P. WHALEN, as Commissioner
of Health of the State of New York, PETER GOLDMARK,
as Director of the Budget of the State of New York,
HUGH L. CAREY, as Governor of the State of New York,

Defendants-Appellees,

—and—

F. DAVID MATHEWS, as Secretary of the United States
Department of Health, Education and Welfare,

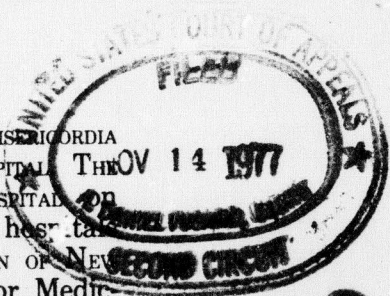
Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLANTS

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HOSPITAL ASSOCIATION OF NEW YORK STATE,
INC., MISERICORDIA HOSPITAL MEDICAL
CENTER, BUFFALO GENERAL HOSPITAL,
THE GENESEE HOSPITAL, and THE MOUNT
SINAI HOSPITAL on behalf of themselves
and all other nonprofit hospitals which
are members of the HOSPITAL ASSOCIATION
OF NEW YORK STATE, INC., and which are
reimbursed for Medicaid Services
rendered to hospital patients,

Plaintiffs-Appellants,

-against-

PHILIP L. TOIA, as Commissioner of
Social Services of the State of New
York, ROBERT P. WHALEN, as Commissioner
of Health of the State of New York,
PETER GOLDMARK, as Director of the
Budget of the State of New York, HUGH
L. CAREY, as Governor of the State of
New York,

Defendants-Appellees,

-and-

DAVID MATHEWS, as Secretary of the
U.S. Department of Health, Education &
Welfare,

Defendant.

Docket No.
77-6152

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLANTS

STATEMENT OF THE ISSUES

1. Whether the retroactive repeal of the provision
of the Medicaid Act that conditioned the maximum federal grant

to a participating State upon the State's consent to suit in the federal courts, and New York State's purported withdrawal of that consent, required the District Court to vacate the judgment for money that had been entered against the State defendants, when:

(a) New York State's initial consent to suit was the product of a voluntary exercise of sovereign will and was freely given to maximize the federal Medicaid grant to the State;

(b) the legislative history of the repealing statute shows that its retroactive effect was only intended to permit States that had not given consent to suit at the time of the enactment of the repeal nevertheless to receive maximum federal grants for the entire year, and was not intended to bar the exercise of federal judicial power in pending cases;

(c) the retroactive application of the repealing legislation would work a manifest injustice;

(d) New York State waived its Eleventh Amendment immunity on several other occasions in the course of its participation in this lawsuit.

2. Whether New York State and the State defendants are estopped from withdrawing their consent to suit.

3. Whether, assuming arguendo that the repealing legislation and the State's purported withdrawal of consent to suit did require the vacatur of the money judgment, there

is a taking of plaintiffs' property without due process.

4. Whether, if the vacatur was proper, the District Court was compelled to order plaintiffs to make repayment.

STATEMENT OF THE CASE

This case, commenced on May 5, 1976, involves a challenge by the voluntary and public hospitals of the State of New York* ("the hospitals") to the promulgation and implementation by the defendant New York State officials** ("State defendants") of certain amendments to the New York State Plan for Medical Assistance ("State Plan") which provides for the reimbursement to the hospitals of costs incurred in providing services to Medicaid patients. The hospitals contended that the challenged amendments were illegal because, among other things: (1) they were not approved by the Secretary of the United States Department of Health, Education and Welfare ("the Secretary") prior to their implementation by the State defendants; and (2) they did not result in reimbursement to the hospitals, as required by the Medicaid Act, of the "reasonable cost" incurred in providing services to Medicaid patients.***

* The plaintiff class consists of approximately 275 voluntary and public hospitals.

** The hospitals also named the Secretary of the United States Department of Health, Education and Welfare as a defendant.

*** After the Secretary approved some of the amendments, the complaint was amended to claim that the Secretary abused his authority in making the approvals.

By decision dated July 29, 1976 (407),* the United States District Court for the Southern District of New York (Lasker, J.), found that, because the State defendants had not obtained pre-implementation approval from the Secretary, the challenged amendments were illegal. Accordingly, by final judgment dated July 30, 1976 and entered August 2, 1976 (428), the District Court permanently enjoined the State defendants from implementing the amendments until approval had been obtained from the Secretary, and ordered that reimbursement rates be recomputed and retroactive payments made to the hospitals according to the approved New York State Plan then in effect.

The District Court did not reach the hospitals' claim that the new rates did not provide for "reasonable cost" reimbursement.

On August 16, 1976, one day before argument was to be heard by this Court on the State defendants' motion for a stay pending appeal from the August 2, 1976 judgment, the Secretary approved most of the amendments previously enjoined by the District Court. This Court then remanded the case to the District Court for a finding as to whether the amendments could be applied retroactively by the State defendants. By memorandum order dated November 5 and entered November 9, 1976

* Unless otherwise identified, parenthetical numbers refer to the pages of the Appendix.

(561), the District Court held that the amendments could not be so applied and directed the State defendants to comply with its prior order.

The State defendants then moved in this Court for a stay pending appeal from the November 9, 1976 order, basing the application on recent legislation, Pub. L. No. 94-552 (the "repealer"), which had repealed the provisions in the Medicaid Act requiring that participating States waive their immunity from suit in federal court in order to receive the maximum federal Medicaid grant. This Court denied the stay application from the bench on December 14, 1976.

By order dated March 16, 1977 (631), however, this Court remanded the case to the District Court for a determination of the effect of the repealer. In the District Court the State defendants moved to vacate the August 2, 1976 judgment insofar as it awarded plaintiffs monetary relief, contending that the repealer revived the State's Eleventh Amendment immunity retroactively to January 1, 1976.

By decision dated August 4, 1977 (684), the District Court granted the State defendants' motion. On August 15, 1977, an order was entered (763) which vacated the August 2, 1976 judgment to the extent that it required the payment of money by the State defendants. That order was modified, in particulars not relevant here, by order dated September 19,

1977 (861). Plaintiffs appeal from the original and modified orders (770,886).*

STATEMENT OF FACTS

The Medicaid Program

Medicaid is a social welfare program designed to assure that low income and indigent persons have access to high quality health care. To foster that objective, federal grants are made available to the States upon satisfaction of various conditions. The States are not required to participate in the Medicaid program. New York State, however, has participated since the program's inception.

Pursuant to Title XIX of the Social Security Act, 42 U.S.C. §§1396-1396j, in a participating State, hospitals that provide care and treatment ("providers") to Medicaid-eligible patients receive reimbursement which is jointly funded by federal and State authorities. In New York State, the 50% non-federal share is borne jointly by the State and

* The State defendants then moved to dismiss the entire case as to them, contending that no meaningful injunctive or declaratory relief could be entered and that the vacatur of the money judgment had thereby mooted the case. By decision dated October 13, 1977, the District Court granted the State defendants' motion to dismiss. A judgment of dismissal was entered on October 18, 1977, from which plaintiffs have also appealed. It is expected that that appeal, No. 77-6174, will be consolidated with the instant appeal.

local governments. While a variety of medical services are paid for under the New York Medicaid program, this case involves only in-patient and out-patient hospital care rendered by voluntary and public hospitals.

New York State's participation in the Medicaid program is regulated by the State Plan, which sets forth, inter alia, the methods and standards for calculating the rate at which the hospitals are reimbursed.* The State Plan, and any amendments thereto, must be approved in advance of implementation by the Secretary.

The Promulgation of the 1976 Amendments

During 1975 and early 1976 New York State officials, employed principally by the Department of Health, set out to revise the State Plan in order to bring Medicaid expenditures within certain pre-determined budgetary limits. Accordingly, these officials promulgated numerous amendments to the State Plan which they knew and intended would significantly lower reimbursement rates received by the hospitals. In fact, the reimbursement rates for approximately one-third of the hospitals in the State were lower in 1976 than in 1975, despite the fact

* The present State Plan is in two parts. The first, denominated Transmittal 74-2, sets forth the general way in which the Medicaid program will be administered and is not at issue here. The second, sometimes referred to as Attachment 4.19A of Transmittal 74-2, contains the formula used to calculate reimbursement.

that (a) the Commissioner of Health had certified that the 1975 rates provided, for that year, reimbursement "reasonably related to the costs of efficient production of such service[s]" and (b) hospital costs admittedly increased from 1975 to 1976 due to inflation. Quite simply, the State defendants' sole purpose in promulgating the 1976 amendments was to lower reimbursement rates without regard to statutory reimbursement criteria.

The Secretary approved the 1976 State Plan amendments on August 16, 1976 (New York State Plan Submittals 76-28 and 76-43) and October 4, 1976 (New York State Plan Submittal 76-41). The State defendants had implemented the amendments, however, even before the Secretary gave his approval. Such preapproval implementation was ruled unlawful by the District Court in its July 29, 1976 decision and that determination was reconfirmed in the Court's subsequent decision on vacatur. See, p. 4, supra, and pp. 11-13, infra.

The Present Action

New rates are announced before the first of each year. The purpose of this prospective rate system is to permit a hospital to know what its income will be for the coming year. Theoretically, a hospital that knows its reimbursement rate before it provides services will endeavor to reduce its costs to or below the announced rate.

The State defendants did not, however, announce a new schedule of 1976 reimbursement rates by January 1, 1976. Rather, they announced an "interim schedule" which froze the 1976 rates at 1975 levels.

The hospitals commenced this class action on May 5, 1976, alleging, among other things, that the freeze on reimbursement rates violated the requirement of the Medicaid Act, 42 U.S.C. §1396a(a)(13)(D), and the regulations promulgated thereunder, 45 C.F.R. §250.30(a)(2), that changes in a State Plan affecting the calculation of in-patient hospital reimbursement rates must be approved in advance of implementation by the Secretary. Since the New York State Plan then in effect did not authorize the State defendants to limit payment for services rendered in 1976 to the rates paid in 1975, it was alleged that the freeze was, in effect, imposed pursuant to an unapproved amendment to the New York State Plan (Complaint ¶34)(16).

In addition, the hospitals alleged that the freeze violated the requirements found in 42 U.S.C. §1396a(a)(13)(D) that a hospital be reimbursed for the "reasonable cost" of the in-patient Medicaid services it provides (Complaint ¶32)(15). The 1975 rates were calculated pursuant to the approved New York State Plan then in effect and, by definition, those

rates, which were based upon 1975 cost factors, provided reasonable cost reimbursement for services provided in 1975. However, since the hospitals' costs had increased, due in large part to inflationary pressures, it was clear that payment for 1976 services at 1975 rates did not provide "reasonable cost" reimbursement.

The State defendants ended their freeze on reimbursement rates on July 1, 1976. In its place, a new rate schedule was implemented, calculated pursuant to amendments to the New York State Plan which had not been approved by the Secretary. The new rates for approximately one-third of the members of the class were less than those paid under the freeze in current dollars. (Amended Complaint ¶32)(101). It is estimated that, in real dollars, almost two-thirds of the hospitals received lower reimbursement.

Accordingly, the hospitals amended their complaint on July 16, 1976, and moved for a preliminary injunction against the implementation of these new rates. The Amended Complaint alleged that the new rates were subject to the same infirmities as the frozen rates, because (1) they had been calculated pursuant to a methodology not approved in advance by the Secretary (Amended Complaint ¶44)(105), and (2) they did not provide for reimbursement to the providers of the "reasonable cost" incurred in providing Medicaid services (Amended Complaint ¶45)(105).

The District Court held hearings on July 20, 1976, and on July 28, 1976. Recognizing that the Amended Complaint raised Eleventh Amendment immunity issues, Judge Lasker specifically asked Assistant Attorney General Jesse Fine the following question:

"Can I have a representation, or do I have a representation from the state that if the court finds the state procedures are invalid and if the state is nevertheless not enjoined but later on is found to owe money to the hospitals, that it will not raise the Eleventh Amendment as a defense to any suit by the hospitals to secure that money?"

Assistant Attorney General Fine replied:

"I think I can make that statement, your Honor."

(Transcript of July 28, 1976 hearing) (403)

The August 2, 1976 Judgment

By opinion dictated in chambers on July 29, 1976 the District Court granted the hospitals a permanent injunction. The District Court held that it had subject matter jurisdiction over the hospitals' claims, that the Eleventh Amendment did not bar the relief sought and that the State defendants had violated the pre-implementation approval requirement of the Medicaid Act.

With respect to subject matter jurisdiction, the District Court, relying on Catholic Medical Center v. Rockefeller, 305 F. Supp. 1256 (E.D.N.Y. 1969), aff'd on the opinion below, 430 F.2d 1297 (2d Cir. 1970), appeal dismissed,

400 U.S. 931, held that it had subject matter jurisdiction over the hospitals' claims under 28 U.S.C. §1331. It therefore rejected the State defendants' affirmative defense of lack of subject matter jurisdiction.

As to the Eleventh Amendment, the District Court found that the State defendants were bound by a consent to suit that had been executed on behalf of the State of New York pursuant to then 42 U.S.C. §1396a(g). That provision of the Medicaid Act required State Plans to include a "consent . . . to the exercise of the judicial power of the United States" and a waiver of Eleventh Amendment immunity with respect to claims arising out of the furnishing of in-patient hospital services. States which executed such a consent received a higher level of federal Medicaid assistance than nonconsenting States.* The consent to suit and waiver had been executed by New York State on March 30, 1976.

Finally, the District Court addressed the merits of the hospitals' claim with respect to pre-implementation approval. Finding that the Medicaid Act, 42 U.S.C. §1396a(a)(13)(D), and the regulations promulgated thereunder, 45 C.F.R. §250.30(a)(2), required a State to obtain the Secretary's approval before amending its State Plan, the District Court

* For States consenting to suit, the federal government would pay 50% of the State's Medicaid expenditures; for unconsenting States, the federal government would pay 45%.

ruled that the State defendants had not obtained this pre-implementation approval.

Accordingly, by judgment dated July 30, 1976, and entered August 2, 1976, the District Court declared that the amendments to the New York State Plan were unlawful. The State defendants were permanently enjoined from implementing the amendments until they had been approved by the Secretary and were directed to "promptly recompute and pay reimbursement rates" to the hospitals according to the approved New York State Plan in effect from January 1, 1976 until the date of the Secretary's approval of the amendments. The District Court stayed the judgment for twelve days, but the stay lapsed, and was not in effect, on August 15, 1976.

The November 9, 1976 Order

On August 16, 1976, one day before argument in this Court on the State defendants' application for a stay pending appeal from the District Court's August 2, 1976 judgment, the Secretary approved several of the amendments* to the New York State Plan.** Despite its knowledge of the Secretary's ap-

* The Secretary did not approve one of the amendments, 10 NYCRR §86.26, (now §86-1.26), until October 4, 1976.

** In view of the Secretary's August 16, 1976 approval, the hospitals filed a Second Amended Complaint (481) dated September 17, 1976, which added a challenge to the Secretary's action.

proval, this Court denied from the bench the State defendants' motion for a stay. Instead, the parties were directed to return to the District Court for a determination as to whether the State defendants could implement the August 16, 1976 amendments retroactively to January 1, 1976.

Thereafter, the State defendants renewed their application to the District Court for a stay of its August 2, 1976 judgment, arguing that compliance with the August 2nd judgment would result in payments which would have to be recouped if the District Court ruled in their favor on retroactivity. The District Court granted the stay on September 28, 1976, on condition that the State defendants agree to pay interest on any payments stayed pending the Court's deliberation on the retroactivity issue.

At a conference held on September 28, 1976, Assistant Attorney General Fine stated that he would "have to clear it with the people in Albany" before acceding to the District Court's condition (531). Subsequently, the State defendants informed the District Court that they were agreeable to the Court's condition. Accordingly, by order signed October 15, 1976, and entered October 29, 1976, the District Court stayed the August 2, 1976 judgment on the express condition that the State Defendants pay interest on any monies withheld by the operation of the stay.*

* Under the District Court's order, interest was to be calculated from September 28, 1976 until the date of payment of any sums found to be due to the hospitals.

The District Court decided the retroactivity issue on November 5, 1976.* It concluded that the 1976 amendments to the State Plan could not be applied retroactively, relying heavily on the pre-implementation approval requirement found in the Medicaid Act and regulations. It therefore directed, by order entered November 9, 1976, that the State defendants recompute the reimbursement rates, for the period prior to the Secretary's approvals, according to the approved State Plan in effect at that time and pay the rates so calculated.

After filing a notice of appeal from the November 9, 1976 order, the State defendants sought a stay pending appeal in this Court. Many of the Eleventh Amendment issues now raised were fully presented in the moving papers. Chief among these was the State defendants' claim that the legislation repealing the consent to suit provision contained in the Medicaid Act ousted the federal courts of jurisdiction over the hospitals' claims for retroactive relief. Nevertheless, on December 14, 1976, this Court denied the State defendants' stay application from the bench. Thereafter the State defen-

* Notwithstanding the fact that the repeal of the Eleventh Amendment waiver requirement in the Medicaid Act was signed into law by the President on October 18, 1976 (see Pub. L. No. 94-552, 94th Cong., 2d Sess. (1976)), the State defendants did not inform the District Court of this development until after its decision on the retroactivity issue.

dants made additional reimbursement payments to the hospitals estimated to be between \$20 million and \$40 million.

On March 16, 1977, the case was remanded to the District Court for reconsideration of the issues raised by the repealer.

The August 15, 1977 Order

On remand the State defendants moved to vacate the August 2, 1976 judgment insofar as it awarded monetary relief. The ground for the motion was that the repeal of 42 U.S.C. §1396a(g), which required a waiver of the State's immunity from suit, was retroactive to January 1, 1976, thereby barring any monetary relief against the State defendants.

By decision dated August 4, 1977, the District Court granted the motion to vacate (684). The District Court held that it was the congressional intent that the repealer operate retroactively to govern pending, as well as future cases, and that the State's waiver could thus be withdrawn retroactively to immunize the State defendants from monetary relief. By order filed August 15, 1977 (763) and modified September 16, 1977 (789,816), the complaint was, accordingly, dismissed insofar as it demanded monetary relief against the State defendants.

Plaintiffs promptly appealed from those orders.

SUMMARY OF ARGUMENT

The repealer did not authorize New York State to withdraw retroactively its consent to suit so as to bar the granting of any monetary relief against the State defendants. The State's consent was voluntary and, under general principles, binding and irreversible for purposes of this lawsuit. Nothing in the legislative history of the repealer indicates an intent to override that principle specifically or to affect pending cases generally. Moreover, a retroactive withdrawal of consent to suit would work a manifest injustice.

Furthermore, statements and actions by the Attorney General on several occasions during the course of the lawsuit constituted waivers of Eleventh Amendment immunity independent of the provisions of the Medicaid Act.

The State defendants are, as well, estopped from withdrawing their consent to suit. Plaintiffs commenced this action in federal court in reliance upon that consent. Principles of fairness, and the public interest in minimizing redundant litigation, compel an estoppel, especially where the illegality of defendants' conduct is unquestioned. Finally, the precedent set by an estoppel would be the narrowest possible.

Interpreting the repealer to permit the State's retroactive withdrawal of consent to this suit would, in addition, result in an unconstitutional deprivation of property. The August 2, 1976 judgment, which granted plaintiffs monetary relief, was entered many months before enactment of the repealer. Under long-established precedent, a statute withdrawing sovereign consent to suit may not be applied retroactively to eradicate a judgment already entered.

Finally, even if the District Court was correct in concluding that the retroactive withdrawal of consent to suit was proper, the Court erred in ruling that it was compelled to order plaintiffs to repay moneys received under the August 2, 1976 judgment. The District Court has discretion to decline to make such an order and that discretion should have been exercised here.

POINT I

PUBLIC LAW NO. 94-552 DOES NOT
PERMIT THE STATE TO WITHDRAW
ITS CONSENT TO SUIT IN THIS CASE

In its decision of August 4, 1977, the District Court concluded that Public Law No. 94-552,* which repealed the provision of the Medicaid Act pertaining to State consent to suit, applied to a pending action predicated upon such consent previously given by a defendant State. The Court thus held that New York State could retroactively withdraw its consent to suit in this case and thereby shield the State defendants, under sovereign immunity principles, from any judgment for monetary relief.

In reaching its decision the court recognized that the Eleventh Amendment is not strictly jurisdictional and that a State can, in a particular case, waive the immunity

* Pub. L. No. 94-552 is brief:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (g) of section 1902 of the Social Security Act [42 U.S.C. §1396a(g)] and subsection (1) of section 1903 of such Act [42 U.S.C. §1396b(1)] are repealed.

Sec. 2 The amendments made by the first section shall take effect as of January 1, 1976."

conferred by the constitutional provision (689-690). The court also acknowledged that a State ordinarily cannot withdraw its consent, once given (701). It was the District Court's view, however, that New York State's consent was not voluntary in a "constitutional sense" (701) and that, accordingly, the State could rely on the repealer to withdraw its consent retroactively in this case.

The District Court was in error for two reasons. First, New York State's consent was voluntary in a "constitutional sense" and, hence, binding. Nowhere in the legislative history of the repealer is there an expression of the intent to override this general principle of law by permitting a State to withdraw in a pending case a consent to suit freely given.

Second, even beyond the persuasive force of this general principle against retroactive withdrawals of consent, the legislative history of the repealer simply does not support the District Court's conclusion that the repealer was intended to affect pending actions.

A. New York State's Consent to Suit Was Voluntary and May Not Be Withdrawn

The District Court concluded that New York State's

consent to suit under then 42 U.S.C. §1396a(g)* was not voluntary because it was given solely to avoid the reduction in federal Medicaid grants prescribed by 42 U.S.C. §1396(b)(1)** for nonconsenting States. Specifically, the Court said:

"We would agree that a state ordinarily ought not be permitted to waive its immunity to suit -- for example in the hope of securing a favorable verdict -- and withdraw its consent to be sued if it loses the case. But no such case is before us. New York's waiver in this suit was found to be valid, not because it was 'voluntary' in the usual constitutional sense, but because Congress required and intended to require such a waiver as a condition to receipt of federal funds. See Employees of the Department of

* 42 U.S.C. §1396a(g) provided:

(g) Notwithstanding any other provision of this subchapter, a State plan for medical assistance must include a consent by the State to the exercise of the judicial power of the United States in any suit brought against the State or a State officer by or on behalf of any provider of services (as defined in section 1395x(u) of this title) with respect to the application of subsection (a)(13)(D) of this section to services furnished under such plan after June 30, 1975, and a waiver by the State of any immunity from such a suit conferred by the 11th amendment to the Constitution or otherwise.

** 42 U.S.C. §1396b(1) provided:

(1) Notwithstanding any other provision of this section, the amount payable to any State under this section with respect to any quarter beginning after December 31, 1975, shall be reduced by 10 per centum of the amount determined with respect to such quarter under the preceding provisions of this section if such State is found by the Secretary not to be in compliance with section 1396a(g) of this title.

Public Health and Welfare of Missouri v. Missouri Public Health Department, supra, 411 U.S. 279; Parden v. Terminal R. Co., 377 U.S. 184 (1964)."

(701)

The District Court's reasoning on this point is wrong. Concededly New York State was induced to give its consent by the prospect of more federal aid. The voluntariness of the State's consent was not, however, in any way "tainted" by that inducement. To the contrary, New York's consent to suit was the product of the exercise of a free and unfettered sovereign will. The decision to give consent was clearly based upon an economic judgment that the possible cost of suit in federal court would be less than the reduction in the federal share of Medicaid reimbursement. Accordingly, the State's participation in this suit is, for constitutional purposes, entirely voluntary and consensual.

This conclusion necessarily follows from the reasoning of Justice Cardozo's seminal opinion in Steward Machine Co. v. Davis, 301 U.S. 548 (1937). That case involved the unemployment compensation provisions of the Social Security Act of 1935 (c. 531, 49 Stat. 620). The Act imposed a federal excise tax upon certain employers, but a credit against the tax was allowed for taxes paid to an unemployment fund established by any State law that, in the judgment of the federal Social Security Board, satisfied certain federally-

prescribed criteria. The petitioner in Steward was a business located in Alabama, a State which had passed such a law in response to the federal legislation. It challenged the Social Security Act on the grounds, inter alia, that it violated the Tenth Amendment to the Constitution and principles inherent in a federal system of government. The petitioner argued that the State law had been extracted by economic pressure and that Alabama had thereby been forced to surrender powers essential to its sovereign existence.

In rejecting the petitioner's argument, Justice Cardozo acknowledged that the federal law contained a strong economic inducement for the States. By enacting a law satisfying the federal criteria a State could provide relief for its unemployed, while at the same time keeping control over funds that would otherwise have been paid to the federal government. Id. at 586-590.

Nevertheless, the federal law was not regarded as an exertion of undue influence by the federal government. Id. at 590. Rather, the State statute was characterized as the product of Alabama's "unfettered will." Id. In making that characterization, Justice Cardozo noted that Alabama was free to change her unemployment compensation system at any time and that the federal government had no power to compel the State to maintain any particular system. Id. at 595.

The unrestrained freedom to revoke State consent to the federal conditions -- albeit with a serious economic penalty -- eliminated any question as to the voluntariness of Alabama's participation in the federal program. Id. at 595-96.

The same reasoning was applied by Chief Justice Hughes in United States v. Bekins, 304 U.S. 27 (1938), to reject a constitutional challenge to provisions of the Bankruptcy Act for the relief of political subdivisions of States. It was argued that the law interfered with the sovereign powers of the States, because the statute invited State consent to the compromise of a municipality's indebtedness. But the Court found that such State consent, although it might be induced by the State's own inability to remedy the economic distress resulting from the Depression, was still the valid exercise of a free, unrestrained sovereign will. Id. at 51-54.

Oklahoma v. United States Civil Service Commission, 330 U.S. 127 (1947), also stands for the proposition that the voluntariness of State consent is not compromised by the presence of a federal economic inducement. There the Civil Service Commission had ordered the State to remove a highway official who had engaged in political activities proscribed by the Hatch Act. If the State refused to comply with the removal order, its federal highway grants would have been reduced as a penalty.

In challenging the Civil Service Commission, Oklahoma contended that the threat to reduce its federal grants interfered with its freedom to regulate the operations of State offices. Id. at 142-43. The Supreme Court rejected the argument, noting that Oklahoma was completely free to ignore the federal threat. Id. at 143-44. The fact that an economic penalty was to be imposed for such State action was not viewed as undermining the voluntariness of the State's actions. Id.

Applying these principles to the case at bar, it is clear that New York State's consent to suit was an entirely voluntary act. Cededly, the critical health care problem created a strong incentive for the State's action, but certainly no stronger than the economic inducement present in Steward Machine Co., supra, where the State's "induced" unemployment law was nonetheless regarded as the product of an "unfettered will." Accordingly, New York State's participation in this case must be treated as the product of choice, not coercion or duress.

It must be remembered that alternatives were freely available to the State. The State could have declined to give its consent, for example, and challenged the objectionable provision of the Medicaid Act, as did many other States (697). Instead, the State voluntarily chose to adhere to its long-standing policy of meeting any requirements for

federal grants under the Social Security Act. That statement of policy, embodied in section 701(c) of the Public Health Law, further belies any claim that there was duress or coercion in this instance.

As the District Court acknowledged, it is a well-established principle that a sovereign, having freely consented to suit, may not use its immunity to suit to move in and out of court, according to the vicissitudes of the litigation. In People of Porto Rico v. Ramos, 232 U.S. 627 (1914), for example, the Territory of Puerto Rico was not permitted to use its sovereign immunity to escape an adverse judgment after the Territory had initially consented to the suit.

The case involved a controversy between two individuals concerning real property in which the Territory also had an interest. After some deliberation, the Attorney General of Puerto Rico advised the District Court that the Territory was an interested party. The court thereupon ordered that Puerto Rico be made a party defendant and that the complaint be amended accordingly.

The Territory then appeared specially and moved to dismiss on the ground, inter alia, that as a sovereign it was immune from suit. The motion was denied and the Territory filed an answer in which it again pleaded sovereign immunity as a defense. After trial a judgment for damages was entered against Puerto Rico.

In the Supreme Court the Territory argued that its sovereign immunity barred any judgment against it. Id. at 631. In rejecting the argument, the Court held that Puerto Rico's representation to the District Court that it was an interested party, which caused it to be joined as a party defendant, was a consent to suit that could not be withdrawn by a subsequent change in view. Id. at 632. The Court's language is particularly apposite here:

"the immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it, and to come in and go out of court at its will, the other party having no right of resistance to either step." Id.

It is noteworthy that the Court reached this conclusion despite the fact that Puerto Rico had hedged its consent by asserting sovereign immunity in support of its motion to dismiss and as an affirmative defense in its answer. See also, Clark v. Barnard, 108 U.S. 436 (1883). New York State attempted here to preserve its Eleventh Amendment immunity in the same way.

That the same principle applies in an Eleventh Amendment context is illustrated by Gunter v. Atlantic Coast Line R. Co., 200 U.S. 273 (1906). There, the State of South Carolina asserted the Eleventh Amendment in an attempt to avoid issuance of an injunction against it enforcing an earlier judgment. In rejecting the State's Eleventh Amend-

ment argument, the Court observed that South Carolina had consented to suit by its voluntary participation in the earlier litigation from which the judgment emanated. Id. at 292. The Court held that the State could not, subsequent to the entry of judgment, withdraw its consent and raise the Eleventh Amendment shield:

"None of the prohibitions, therefore, of the amendment ... relate to the power of a Federal court to administer relief in cases where jurisdiction as to a state and its officers has been acquired as a result of the voluntary action of the state in submitting its rights to judicial determination." Id.

The analogy between Porto Rico v. Ramos and Gunter v. Atlantic Coast Line R. Co., and the case at bar, is clear. New York, induced by economic incentive, as was Puerto Rico, voluntarily subjected itself to suit in the federal courts. In an attempt to qualify that consent, however, New York hedged by both moving to dismiss and pleading an affirmative defense founded on State immunity to suit. Puerto Rico made the same attempt with regard to sovereign immunity. And, by application of the principles expressed in Porto Rico and Gunter, it is clear that New York State may not now avoid the effect of its consent to suit anymore than could the sovereigns in those cases.

Indeed, if anything, New York State's posture in this case provides even less support for its sovereign immunity plea than did the conduct of Puerto Rico and South

Carolina. Under its theory of the case, New York State could have reasserted its immunity argument prior to the District Court's November 5, 1976 decision, which in effect implemented the judgment of July 29, 1976, because the repealer upon which the State now relies was enacted on October 18, 1976. The State should have been aware of the enactment of the repealer, and should have made that fact known to the District Court. Yet no argument on this issue was presented until November 15, 1976, some ten days after the District Court's decision. Thus, even if the State could have preserved its position regarding consent to suit by its motion to dismiss and affirmative defense, that position was clearly abandoned when the District Court was permitted to render judgment notwithstanding that, in the State's view, its immunity to suit had reattached. See, Gunter v. Atlantic Coast Line R. Co., supra; Cf. Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen, 43 F.2d 705, 707 (2d Cir. 1930), cert. denied, 282 U.S. 896 (1931).

Certainly, when Congress originally enacted 42 U.S.C. §1396a(g), it fully expected that States would give the requisite consents. Cases such as the one at bar were obviously anticipated. It is not unreasonable to expect, therefore, that when Congress repealed the statute, it would have spoken directly and plainly of the special problems raised by pending actions to which States had consented, if the repealer had been intended to affect those suits. Yet the District Court found nothing in the legislative history constituting such an expression of intent (694). And nowhere

in the legislative history is there an indication that States would be permitted to withdraw from pending suits in the face of the general principle of law against such withdrawals.

Contrary to the District Court's view, binding the State defendants to the judgment here will not result in the "anomaly" of penalizing States that consented to suit, while rescuing from liability disobedient States that refused to waive immunity. Federal statutes often confront States with the dilemma of defying federal requirements and seeking judicial review or acceding to the federal demand in order to receive immediately the available benefits. Thus, for example, in Friends of the Earth v. Carey, 552 F.2d 25 (2d Cir. 1977), cert. denied, 46 U.S.L.W. 3261 (1977), this Court held New York State bound to comply with complex Clean Air Act standards to which the State had consented, despite the fact that defiant States had ultimately avoided virtually all responsibility under the statute. See, Maryland v. Environmental Protection Agency, 530 F.2d 215 (4th Cir. 1975), vacated and remanded, 97 S.Ct. 1635 (1977); District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975), vacated and remanded, 97 S.Ct. 1635 (1977); Brown v. Environmental Protection Agency, 521 F.2d 827 (9th Cir. 1975), vacated and remanded, 97 S.Ct. 1635 (1977).

B. The Legislative History of Public Law
No. 94-552 Does Not Support the Con-
clusion that the Law Was Intended to
Apply to Pending Actions

Although the District Court concluded that the

objective of Public Law No. 94-552 was both to eliminate the ten-percent penalty imposed against States that had not consented to suit and to remove the requirement that States subject themselves to suit in the federal courts (695-696), the Court conceded that the legislation and its history are devoid of any expression of an intent to eradicate pending litigation (694). Nevertheless, the Court ruled that the purpose of the repealer was to divest the District Courts retroactively of jurisdiction over suits by Medicaid providers against the states" (698).

In reaching that conclusion, the District Court relied heavily on De Rodulfa v. United States, 461 F.2d 1240 (D.C. Cir.), cert. denied, 409 U.S. 949 (1972), for the proposition that a retroactive jurisdictional statute removes the Court's power to hear all pending cases (699-701). Aside from the fact that Pub. L. No. 94-552 is not a jurisdictional statute (see, pp. 32-33, 33 n., infra), De Rodulfa is not dispositive here because the factual setting which resulted in the De Rodulfa decision is quite different from that which obtains in this case.

Specifically, in De Rodulfa, which involved challenges to administrative rulings by the Veterans Administration, there was detailed legislative history for the amendatory statute evincing a congressional intent to eliminate all judicial review of such administrative proceedings. In particular, the legislative history made clear that the statute was directed at several decisions of the District of Columbia Circuit which had engen-

dered litigation that Congress had never intended to permit concerning Veterans Administration determinations. Thus, although the legislative history did not expressly indicate that the amendatory statute's retroactivity was aimed at pending cases, the strong congressional disapproval of the decisional law underlying those cases led to the logical conclusion that the pending litigation was encompassed by the amendment.

In the case at bar, however, nothing in the repealer or its legislative history indicates that the intent was to permit States to withdraw their consent in pending suits. That the legislative history speaks of relieving the States of the burden of lawsuits is not the dispositive factor it was viewed to be by the District Court (697). Clearly, by eliminating the consent to suit provision, Congress sought to make the States free to avoid further lawsuits, just as it also sought to free nonconsenting States from the ten-percent penalty. But this objective in no way leads to the conclusion that pending suits were to be swept away, with the injustice that would be done to litigants who had relied on the availability of a federal forum (and, perhaps, forfeited State court remedies).

Indeed, Pub. L. No. 94-552 did not oust the federal courts of any jurisdiction because it did no more than repeal a provision which did not, indeed could not, confer jurisdiction. 42 U.S.C. §§1396a(g) and 1396b(1), did not purport to grant

jurisdiction. Rather, the former section dealt only with waiver of immunity to suit and the latter with the penalties that would be assessed for a State's failure to waive.*

Congress expressly recognized that it was not passing jurisdictional legislation when it repealed 42 U.S.C. §1396a(g). The Senate Committee on Finance, after proposing that HEW create an administrative mechanism for the consideration and adjudication of provider grievances over reimbursement rates, stated:

"The development and promulgation of these regulations should not be construed as in any way contravening or constraining the rights of the providers of Medicaid services, the State Medicaid agencies, or the Department to seek prospective, injunctive release [sic] in a federal or state judicial forum. Neither should the repeal of Section 1902(g) [42 U.S.C. §1396a(g)] be interpreted as placing constraints on the rights of the parties involved to seek such prospective, injunctive relief." S. Rep. No. 1240, at 4.

* It is well settled that the Eleventh Amendment may be waived. Thus, in Edelman v. Jordan, 415 U.S. 651, 678 (1974), the Supreme Court did not state that the Eleventh Amendment was jurisdictional, but rather that the "defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court." (Emphasis supplied.)

If the Eleventh Amendment were jurisdictional, then the Edelman Court would not have been able to hold, as it did, that the Eleventh Amendment could be expressly waived. Id. at 673. It is, of course, a first principle of federal practice that subject matter jurisdiction in the federal courts may not be conferred by consent. See, e.g., California v. LaRue, 409 U.S. 109, 112-13 n.3 (1972); Brenner v. Manson, 383 U.S. 519, 523 (1966).

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The limited scope of the repealer becomes clear when the repealer is set against the statutory provisions it expunged. The consent to suit and waiver provision, 42 U.S.C. §1396a(g), required that a State Plan "must include a consent . . . to the exercise of the judicial power of the United States . . . and a waiver by the State of any immunity from such a suit conferred by the 11th amendment" By repealing this provision, Congress did no more than remove the requirement that a State Plan contain the consent and waiver. It did not require States to withdraw their waivers, nor did it invalidate such waivers. Certainly, the mere removal of a requirement that a State must consent to the exercise of federal judicial power and waive its immunity does not amount to an ouster of federal jurisdiction, does not automatically void waivers previously executed and does not authorize the State defendants to withdraw their waiver insofar as it affects this lawsuit.

Rather, the primary congressional concern was to nullify retroactively the ten-percent penalty. By the express terms of 42 U.S.C. §1396b(1), any State which had not executed a consent to suit by the end of the first quarter of 1976 would have been subject to a ten percent reduction in Medicaid funding. The repealing legislation, made retroactive to January 1, 1976, removed the authorization for the imposition of this penalty. As the House Report makes clear, the principal purpose of making the repealing legislation retroactive was to void the operation of the penalty provision:

"[42 U.S.C. §§1396a(g) and 1396b(1)] also provide that any State which fails to change its State medical assistance plan to consent to suits by providers concerning payment of reasonable cost is subject to a penalty of a reduction of 10 percent in the amount of the Federal share of their Medicaid funds. This sizeable penalty went into effect almost immediately upon enactment of the legislation; the bill became law on December 31, 1975, and States had to change their plans before March 31, 1976. This rapid change in plans has been impossible for many States to effect; some even require a meeting of the State legislature to change the State plan.

Further, several States have refused to make the change in State plan because of their strong concern about the inadvisability of waiving their immunity. Many States are thus now subject to the penalty, in amounts which could total over \$40 million in the first quarter. This substantial penalty bears little relation to any substantive question relative to these States' administration of the Medicaid program"

H.R. Rep. No. 1122, 94th Cong., 2d Sess. 4-5 (1976).

To effect the congressional desire to prevent a State from being penalized for its failure to execute a consent to suit and waiver, it was necessary to repeal 42 U.S.C. §§1396a(g) and 1396b(1) retroactively. Otherwise, a State which had not complied with the directive contained in that section would have been subject to sanctions in a compliance proceeding. See, 42 U.S.C. §1396c.

Congress' predominant concern with the ten-percent penalty is also illustrated by Representative Carter's statement in the House:

"We are now faced with a situation which deserves immediate attention. Many States may be penalized 10 percent of their Federal medicaid funds as a result of this ill-considered provision.

It has been estimated that the States which are not in compliance with the December legislation may lose a total of \$160 million for fiscal year 1976.

My State of Kentucky stands to lose almost \$12 million in Federal money for the medicaid program as a result of this penalty.

I have received a letter from the Governor of Kentucky urging repeal of this problematic provision as soon as possible. I know that other Members, too, have received similar requests."

122 Cong. Rec. 4280 (daily ed. May 12, 1976).

The District Court felt that a major reason for making the repealing legislation retroactive was to avoid unreasonably burdening the States with lawsuits (697).

It is clear from the legislative history, however, that pending cases were not the object of the repealer:

"The Department of Health, Education, and Welfare, the Governors and Attorneys General of the States are all concerned that the result [of waivers executed in compliance with 42 U.S.C. §1396a(g)] will be an unreasonable burden of suits which will be costly in terms of time and legal manpower, and which will make efficient program administration virtually impossible." H.R. Rep. No. 1122, supra, at 4 (emphasis supplied).

The use of the words "will be", indicates that the congressional concern was with future lawsuits and not with pending litigation.*

* Despite diligent research, we have been unable to find any other case presently pending in any federal court in which waiver made pursuant to 42 U.S.C. §1396a(g) was invoked either as a basis of jurisdiction or as authorization for the relief sought.

Moreover, it is clear that the repeal of the consent to suit provision, as distinct from the penalty provision, was a half-hearted compromise and not a broad stroke against all challenges to State action. The Senate Report expressed dismay over the lack of "mechanisms" for handling providers' claims under the reasonable cost provision, and recognition of State evasion of that provision and of foot-dragging by HEW in carrying out its duty to regulate the States. S. Rep. No. 1240 at 3, 4. The Report, in a broad hint to hospitals, stated that the providers' rights to "prospective, injunctive relief" were not to be affected by the repealer. Id. at 4. These statements hardly exhibit a congressional desire to have the repealer construed as broadly as possible against the hospitals.

Furthermore, contrary to the assertion of the State defendants below, the House Report does not indicate that Congress felt that a more appropriate vehicle for testing State compliance with federal Medicaid standards was in existence. To the contrary, the Committee pointed out that the compliance proceeding mechanism upon which the State defendants would have the hospitals rely "has proved to be unwieldly and time-consuming and has, in fact, only been undertaken once by HEW." H.R. Rep. No. 1122, supra, at 3.

Clearly, then, Congress did not intend to withdraw federal jurisdiction over pending actions. If the judgment

in this case is to be nullified, it must be nullified solely on the strength of the State's repudiation of its voluntary waiver of immunity to suit.

C. It would Be Manifestly Unjust For The Court
To Retroactively Apply Public Law No. 94-552
So As To Void The August 2nd Judgment-----

It is settled that a statute may not be retroactively applied so as to cause manifest injustice. It is clear that, in the instant case, the State defendants' interpretation of the repealer and the State's retraction of its waiver would result in manifest injustice to the plaintiffs. Absent a clear congressional intent to apply the repealer to this action, it should not be applied.

Retroactive withdrawal of jurisdiction would be manifestly unjust because it would (1) deprive the plaintiffs of the final judgment already entered in their favor; (2) potentially deprive the hospitals of millions of dollars of reimbursement to which they are legally entitled; (3) seriously jeopardize the hospitals' ability to delivery quality health care to the low-income and indigent citizens whom Medicaid was designed to protect; and (4) permit the State to repudiate its obligations even after they have ripened into judgments.

The leading exposition of the rule of manifest injustice is found in Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974). In that case, the Supreme Court held that it would not be manifestly unjust to retroactively apply a provision of Title VII which authorized

the award of attorneys' fees in desegregation cases. In reaching its decision, the Court set out standards for the determination of whether manifest injustice is threatened. As an examination of Bradley reveals, the considerations which led the Court there to conclude that there was no manifest injustice compel the conclusion, in the instant case, that manifest injustice would indeed take place if plaintiffs were deprived of their judgment.

In considering the manifest injustice question, the Bradley court pointed to three "concerns . . . relative to the possible working of an injustice..." These concerns are:

"(a) the nature and identity of the parties (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights."

Id. at 717.

1. The Nature and Identity of the Parties

In Bradley, the plaintiffs sued to eliminate segregation in the Richmond, Virginia educational system. Since the plaintiffs were taking action to bring the School Board into compliance with constitutional requirements, they were discharging a public function and, in the words of the Supreme Court, had "rendered substantial service both to the Board itself . . . and to the community at large" Id. at 718. On this theory, it was not unfair to retroactively

assess attorneys' fees against the School Board.

In the instant case, the hospitals are also discharging an important public function. First, and foremost, they are providing medical care to the low income and indigent, consistent with federal policy. Second, by the commencement of this lawsuit, they sought to bring the State defendants into compliance with federal law. (The District Court's holding that the State defendants violated federal law was reconfirmed in the decision on vacatur and remains the law of this case.) This lawsuit thus insured (1) that the State defendants would be spending federal funds in compliance with federal law; and (2) that the hospitals would be getting the money necessary to carry out the purposes of the Medicaid program.

2. The Nature of Plaintiffs' Rights

In Bradley, the Supreme Court stated that it would refuse to apply a change in law to a pending action "where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional." Id. at 720. In the instant case, if the State defendants' contentions are accepted, plaintiffs will be deprived of their vested rights in the August 2, 1976 judgment. See Point IV, infra.

Furthermore, if the State defendants are permitted

the close the federal courts to plaintiffs, can they not do the same in the State courts?

3. The Nature of the Impact of the
Change in Law Upon Plaintiffs' Rights

The third concern of the manifest injustice rule "stems from the possibility that new and unanticipated obligations may be imposed upon a party without notice or an opportunity to be heard." 416 U.S. at 720. Certainly, the the State's withdrawal of its consent aptly fits this description. When the plaintiffs commenced this lawsuit, and expended time, effort and much money in the Federal courts, they did so in justifiable reliance* upon the fact that the State defendants had waived their immunity. Should this Court now accept the State defendants' interpretation of the repealer, it will impose a new and unanticipated burden on the plaintiffs by forcing them to repeat this arduous exercise in another forum - if available.

* See p. 50, *infra*.

POINT II

THE STATE DEFENDANTS WAIVED THEIR ELEVENTH AMENDMENT IMMUNITY IN THE COURSE OF THEIR PARTICIPATION IN THIS SUIT

In addition to the binding and irreversible consent to this suit given by New York State, the State defendants waived their Eleventh Amendment immunity on several occasions in the course of their participation in this suit. Thus, for example, at a conference held on July 28, 1976, (see, p.11, supra), the State defendants' attorney represented that the State would not raise any Eleventh Amendment defense to a suit for money found to have been wrongfully withheld from the hospitals (403). This representation was made to the District Court to induce the Court to refrain from entering its injunction.

A judicial waiver, like the one made by the attorney for the State defendants, was held binding and valid in Vargas v. Trainor, 508 F.2d 485 (7th Cir. 1974), cert. denied, 420 U.S. 1008 (1975). Vargas involved a challenge to the procedures followed by the Illinois Department of Public Aid in reducing public assistance benefits. After the District Court rejected the plaintiffs' claims, an application for an injunction pending appeal was made in the Court of Appeals. In their brief submitted in opposition to the motion, the State defendants in Vargas argued that the plaintiffs would not be irre-

parably injured if the injunction were not granted. This alleged absence of possible injury was because, as the brief represented, if plaintiffs were successful in their appeal they "[would] be awarded any benefits wrongfully withheld" Id. at 492. In finding that this representation constituted a waiver of Eleventh Amendment immunity, the Court held:

"A representation made in a judicial proceeding for the purpose of inducing the court to act or refrain from acting satisfies the requirements stated in Edelman. We therefore hold that defendant has deliberately waived the protection of the Eleventh Amendment."

Id. at 492.

Second Vargas-type waiver occurred when the State defendants agreed to pay interest on any monies ultimately determined to be retroactively due, in exchange for a stay of the order requiring payments to the hospitals pending the determination of the retroactivity issue. This agreement by the State defendants to pay the sums found to be due as well as interest for a specified period, was clearly made "to induce the court" to enter a stay order. Moreover, it was made without reservation of any possible Eleventh Amendment immunity barring the necessity for making the payments. See Jordan v. Fusari, 496 F.2d 646, 651 (2d Cir. 1974), in which this Court recognized that an agreement by a State attorney general to make certain payments constituted a waiver of the State's Eleventh Amendment immunity.

Yet another waiver occurred after enactment of the repealer. Although the repealer became law on October 18, 1976, the State defendants did not raise their "revived" immunity defense until November 15, 1976, some ten days after the District Court had ruled that the 1976 amendments to the State Plan could not be applied retroactively. Indeed, on November 12, 1976, the State defendants submitted papers to the Court on a discovery matter without ever raising the "revived" immunity issue. Such conduct alone may constitute a waiver of immunity to suit. See, Niagara Falls Power Co. v. White, 292 N.Y. 472, 481 (1944). And in conjunction with the other acts of the State defendants, there was clearly a waiver under the Vargas standard.

The District Court held that the July 28, 1976 representation of the Assistant Attorney General could not have been intended as a waiver because it was made before any ruling on the State defendants' motion to dismiss on Eleventh Amendment grounds (702). But the attorney's statement is clear on its face. In plain fact, this conduct is precisely the kind proscribed in People of Porto Rico v. Ramos, discussed in Point I. In the course of this litigation the State defendants have dropped the Eleventh Amendment shield when it suited them, only to raise it again at a subsequent

propitious time.

Nor was the District Court correct in its determination that there would be "serious doubts" as to the Assistant Attorney General's authority to effect such a waiver (702). The New York courts have recognized that the Attorney General does have such power and that actions by him during the course of a litigation can result in a waiver of immunity from suit which is binding on the State.

Thus, in Security National Bank v. Sabatelli, 38 Misc. 2d 503 (Sup. Ct. 1962), the Court held:

"[A]ny immunity that might have originally existed, has been waived by the Attorney General's actions in appearing generally, interposing an answer and asking for summary judgment in favor of the State, on the merits. It follows that he has consented to the State's being a party defendant, and he has in its behalf waived its immunity, if any, from suit herein (Maguire v. Monaghan, 206 Misc. 550, 554, 555, aff'd, 285 App. Div. 926)."

Id. at 504-05.

Other cases in which actions of the Attorney General during the course of a litigation have been construed as a binding waiver of the State's immunity from suit include Maguire v. Monaghan, 206 Misc. 550 (Sup. Ct. 1954) (McGivern, J.), aff'd, 285 App. Div. 926 (1st Dep't. 1955); 39th-40th Corp.

v. Port of New York Authority, 188 Misc. 657, 658 (Sup. Ct. 1946) (Botein, J.). See also, Niagara Falls Power Co. v. White, 292 N.Y. 472, 481 (1944).

In re Woitasek, 179 Misc. 947 (Sup. Ct. 1943), the New York case relied upon by the State defendants and cited by the District Court, is readily distinguishable from the general line of authority. In that case, a State agency sued the committee of a deceased incompetent to recover sums due for care and maintenance. The committee counterclaimed for the value of the services allegedly rendered by the incompetent to the State during his confinement. In deciding what was, in effect, the State's motion to dismiss the counterclaim, the Court merely held that "there can be no offset for any claim made against the State of New York except as provided by statute" Id. at 948. Although the Court gratuitously noted that "the Attorney-General may not waive the State's immunity from any action" (id.), it is apparent that, unlike the instant case, the Attorney-General in Woitasek did not engage in activities which could reasonably have been construed as a waiver of the State's immunity from suit.

Seitz v. Messerschmitt, 117 App. Div. 401 (1st Dep't), aff'd, 188 N.Y. 587 (1907), the only other New York case cited by the State defendants, is similarly distinguishable, since the Court there merely held that "a sovereign

State could not be sued in its own courts without its consent" and that a plaintiff could not coerce the State into giving such consent by the mere expedient of naming the Attorney General as a party to the action. Id. at 402. Unlike the instant case, there was no indication in Seitz that the Attorney General had engaged in any activities which could be construed as a waiver of the State's immunity from suit.

Thus, it is clear that the New York courts have recognized that the Attorney General has the power to waive the State's immunity from suit and that his actions during the course of a litigation can result in such a waiver.

It is significant, moreover, that until their appeal to this Court in December, 1976, the State defendants never asserted their claim regarding the Attorney General's lack of authority to waive immunity. They did not raise this claim before the District Court, nor did they assert it on the two previous occasions when they appeared before this Court. Instead, they led Judge Lasker to believe that the waivers had been made in good faith.* Relying upon the

* In view of the fact that the issues raised by this case are of paramount importance to the State of New York, as well as to the hospitals, it strains credulity to think that the judicial waivers made in this litigation were not authorized by the State defendants themselves, all of whom are officials at the highest levels of the State government (Governor Carey, Commissioner Toia, Commissioner Whalen, Budget Director Goldmark). Indeed, prior to agreeing to the waiver involving the interest agreement, Assistant Attorney General Fine told the Court that he "would have to clear it with the people in Albany". Thus, since the record contains no assertion to the contrary, it must be presumed that this waiver was in fact authorized at the highest levels of the State government before it was made.

representations of the Attorney General, Judge Lasker was induced to enter a stay of his August 2, 1976 judgment.

In sum, whatever the effect of the repealer on the State's immunity to suit, the State defendants have on several occasions during the course of this lawsuit taken actions which, independently, constituted waivers of that immunity. Those actions were taken by persons with authority, and were done to influence and affect the proceedings before the District Court. Accordingly, those waivers are binding on the State defendants.

POINT III

THE STATE DEFENDANTS ARE ESTOPPED BY THEIR PRIOR CONDUCT FROM WITH- DRAWING THEIR WAIVER OF IMMUNITY

Since the plaintiffs commenced this litigation in reasonable reliance on the previously executed waiver of sovereign immunity, the State defendants are estopped from withdrawing their waiver to avoid the August 2, 1976 judgment. "An estoppel rests upon the word or deed of one party upon which another rightfully relies and so relying changes his position to his injury." Metropolitan Life Insurance Co. v. Childs Co., 230 N.Y. 285, 292 (1921). Accord Triple Cities Construction Co. v. Maryland Casualty Co., 4 N.Y.2d 443, 448 (1958). "Under proper circumstances a sovereign State, like an individual, may be . . . estopped." Clark v. State, 20 App.Div.2d 182, 190 (4th Dep't 1964) aff'd, 15 N.Y.2d 990 (1965). See, also, Prebensen & Blakstad v. Board of Commissioners, 241 F.Supp. 757, 760-62 (E.D. La. 1965); Turner Construction Co. v. State, 253 App.Div. 784, 785 (3d Dep't 1937), mod. on other grounds, 279 N.Y. 243 (1938); Society of the New York Hospital v. Mogensen, 65 Misc.2d 515, 519 (Civ. Ct. 1971).

There can be no question that the instant case presents an appropriate situation for the invocation of an estoppel against the State defendants to prevent them

from withdrawing their consent to suit in order to void the August 2, 1976 judgment. The plaintiffs commenced this litigation in federal court, expending time and money in justifiable* reliance upon the availability of a federal forum with the authority to grant monetary relief. Now, more than a year after this action was commenced, the State defendants seek to avoid the effect of the waiver.

Eden v. Board of Trustees of the State University of New York, 49 App.Div.2d 277 (2d Dep't 1975), motion for stay denied, 38 N.Y.2d 938 (1976), is particularly apposite here. In Eden, the plaintiffs brought an action to compel the State University to open a new School of Podiatry. Prior to the lawsuit, plaintiffs had been admitted to the school, but the defendants decided to defer its opening. The alleged basis for this decision was that the State could not afford the school's cost. The Eden court held that the students' admissions constituted contracts binding upon and enforceable against the State.

In holding that the State could not defer the

* So long as the waiver was in effect, the plaintiffs had a legal, equitable and moral right to rely upon it. As the Supreme Court stated in Untermeyer v. Anderson, 276 U.S. 440, 445-46 (1928):

"[A citizen] cannot foresee and ought not to be required to guess the outcome of pending measures. The future of every bill while before Congress is necessarily uncertain. The will of the lawmakers is not definitely expressed until final action thereon has been taken."

opening of the School of Podiatry, the Eden Court refused to allow the defendants to interpose the defense that they had no capacity to enter into the contracts with the students. The Court held that the State was estopped from raising such a defense.

In its analysis of the estoppel issue, the Eden Court weighed "the degree of manifest injustice" that would result if an estoppel were not recognized, against "the effect, in the particular case, of intervention into the public processes". Id. at 284. (See, pp. 38-41, supra.) Applying this test, the Court recognized the estoppel claim for the following reasons:

"(1) the representations by SUNY, which had been given apparent authority, misled the student applicants and placed them in an extremely dubious position;

(2) the alleged basis for the deferment [of the opening of the school], after unequivocal acceptance, was a false budgetary consideration, for it will not save money for the academic year in question and therefore has no relevant rationale;

(3) the injustice to petitioners otherwise resulting would far outweigh the minor effect upon public interest or policy which may result from invoking estoppel; and

(4) the precedent set by allowing estoppel is narrow in that it depends upon a considerable combination of governmental actions not likely to recur."

49 App.Div.2d at 284.

The very same considerations that led the Eden court to estop the State, compel the conclusion that the State defendants in the instant case should be estopped from withdrawing their waiver of immunity:

First, the representations and actions by the State and the State defendants clearly misled the plaintiffs, who justifiably relied upon their right to an enforceable federal adjudication of the State's monetary liability.

Second, the underlying basis for the State defendants' attempt to withdraw their waiver is based upon a false budgetary consideration. Since the State defendants did not contest in the Court of Appeals the underlying validity of the August 2, 1976 judgment, at some time and in some place the State defendants should be ultimately be required to pay the same amount of reimbursement as was awarded by the judgment. Thus, their present attempt to void the judgment merely delays the inevitable (unless the State defendants seek to deny plaintiffs any forum; see, pp. 40-41 supra.)

Third, the injustice which will be suffered by the plaintiffs if the State defendants are allowed to void the effect of a judgment unfavorable to them is obvious. Plaintiffs will again be thwarted in their efforts to recover what the District Court has determined to be due them under the Medicaid Act -- reimbursement under the pre-August 16, 1976

State Plan (713). Not only will the considerable time and money already expended by the plaintiffs go to waste, but plaintiffs will be forced to seek another forum at further expense. The public interest will be furthered by the imposition of an estoppel against the State defendants, since the State defendants thereby will be required to comply with their obligations under federal and State law, and without resort to repetitive litigation in another forum.

Fourth, the precedent set by a finding of estoppel in this case would be the narrowest possible, since the circumstances of this case are extremely unlikely to recur. Repetition would require that Congress again pass a statute requiring the State defendants to waive their immunity to suit, that a judgment be entered in a suit predicated upon such a waiver, that the statute be repealed before an appeal has been prosecuted, and that the State defendants thereafter attempt to avoid the obligations of the judgment. Moreover, the instant case appears to be sui generis, since there is apparently no other case pending in the country in which the waiver of immunity formerly required by the Medicaid Act has been invoked as the basis for obtaining a money judgment in federal court. See, p. 36 n., supra.

POINT IV

UNLESS THE AUGUST 2, 1976 JUDGMENT
IS REINSTATED, PLAINTIFFS WILL BE
DEPRIVED OF PROPERTY WITHOUT DUE
PROCESS OF LAW

A serious constitutional impediment stands in the way of the retroactive retraction of the waiver of immunity. If the August 2, 1976 judgment is vacated, then plaintiffs will be deprived of their property rights in the judgment in violation of due process of law under the the Fifth and Fourteenth Amendments to the Constitution.

A. Plaintiffs Have A Constitutionally Protected
Property Right In The August 2, 1976 Judgment

The Supreme Court has decided a case directly on point holding a purported withdrawal of a State's consent to suit unconstitutional because the suit had gone to judgment. McCullough v. Commonwealth of Virginia, 172 U.S. 102 (1898).

In McCullough, the plaintiff brought suit against the Commonwealth of Virginia to establish the genuineness of certain bond coupons under a State statute waiving sovereign immunity. Judgment was entered for the plaintiff. While an appeal from that judgment was pending, the Virginia legislature repealed the waiver. The Virginia Supreme Court reversed the judgment, although not on the ground that the waiver statute had been repealed. 90 Va. 597 (1894).

On writ of error, the United States Supreme Court reversed. It rejected the State's claim that the judgment should be vacated because the waiver statute had been repealed, holding that the Virginia legislature lacked the power to divest the plaintiff of his judgment.

The State had contended:

"that since the judgment in the trial court and prior to the decision in the court of appeals the general assembly of the state of Virginia passed an act (Acts Gen. Assembly, 1893-94, p. 381) in terms repealing the statute authorizing this particular form of suit; that no state can be sued without its own consent; that such consent has thus been withdrawn, and therefore the whole proceeding abates and this suit must be dismissed." Id. at 123.

The Supreme Court rejected the argument that the repealing statute could be retroactively applied to deprive plaintiff of his judgment because that judgment, even though still on appeal, was a vested right entitled to constitutional protection. Thus, the Court held:

"At the time the judgment [in plaintiff's favor] was rendered . . . the act of 1882 [the waiver statute] was in force, and the judgment was rightfully entered under the authority of that act. The writ of error to the court of appeals of the state brought the validity of that judgment into review, and the question presented to that court was whether at the time it was rendered it was rightful or not. If rightful the plaintiff therein had a vested right which no state legislation could disturb. It is not

within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.... [W]e have no doubt that the rights acquired by the judgment under the act of 1882 were not disturbed by a subsequent repeal of the statute.... [I]nasmuch as the judgment in the trial court was rendered, as we have seen, prior to the repealing act . . . the right acquired by the judgment creditor was not and could not constitutionally be taken away."

Id. at 123-125 (emphasis added).

Thus, McCullough makes it absolutely clear that in the case at bar either the State's retroactive withdrawal of its waiver was ineffective, or the repealer authorizing it is unconstitutional. Accordingly, if this Court upholds the vacatur of the August 2, 1976 judgment, plaintiffs will have been deprived of property without due process of the law.

The District Court distinguished McCullough on two grounds: (1) that there the waiver repealer eliminated the plaintiff's underlying rights as well as his remedy, whereas here plaintiffs are said to have lost only one of several remedies; and (2) that McCullough was decided in a unique historical context. (705-706). The premises underlying these distinctions are incorrect.

The McCullough Court specifically considered the

existence of other remedies for plaintiff's rights and found that their existence or non-existence was irrelevant:

"It was said, however, in the argument of counsel that the former remedy [for plaintiff's right] was one arising under the common law, and that the settled law of Virginia is that when an act is passed repealing an act creating a statutory remedy it operates to revive the former common-law remedy.... But it is not necessary now to determine that question, inasmuch as the judgment in the trial court was rendered, as we have seen, prior to the repealing act, and the right acquired by the judgment creditor was not and could not constitutionally be taken away."

172 U.S. at 125.

In other words, once a right has ripened into a judgment, it is immune from State repudiation, regardless of other available remedies.

Nor were the surrounding circumstances of McCullough unique. In that case Virginia sought to repudiate its legal obligations under an issue of bonds. There was a purported withdrawal of the State's consent to suit, which had previously been given to the bondholders, to bar a judicial determination of the lawfulness of Virginia's actions.

Here, for alleged budgetary reasons, the State defendants "acted in blatant disregard of the federal requirement" (713) in an effort to reduce the reimbursement they were required to pay under the Medicaid Act. And, just as in McCullough, the State defendants sought to thwart judicial

relief by withdrawing their consent to suit after judgment.

The Supreme Court's holding in McCullough was reaffirmed in Hodges v. Snyder, 261 U.S. 600 (1923). In that case, the Court stated that:

"the private rights of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation. Pennsylvania v. Wheeling Bridge Co., 18 How. 421, 429; The Clinton Bridge, 10 Wall. 454, 463; United States v. Klein, 13 Wall. 128, 146; McCullough v. Virginia, 172 U.S. 102, 124 (in which the repealing act was passed after judgment by the trial court)."

Id. at 603.

The Court specifically noted that special damages and costs fell within the types of private rights protected, once a judgment had been entered. Id. at 604.

The Supreme Court has never repudiated McCullough. The District Court cited 149 Madison Avenue Corp. v. Asselta, 331 U.S. 199, modified, 331 U.S. 795 (1947) (707), to the contrary, but the Court there took no position on the retroactive effect of the repealing statute. 331 U.S. at 795. In Thorpe v. Housing Authority, 393 U.S. 268 (1969), also cited below, the judgment was not for money but eviction, and the Supreme Court did not discuss whether it constituted a vested right protected by the Due Process clause. United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801), was also cited

by the District Court to support the retrospective application of new legislation by an appellate court. In Schooner Peggy, however, Chief Justice Marshall expressly acknowledged that lower court judgments vest compensable property rights. Moreover, the decision states that, as a general rule, new laws should not be applied retrospectively to affect those rights.

The Court in Schooner Peggy departed from the general rule only because the treaty ending hostilities between the United States and France was involved and its retrospective application was warranted by the national interest:

"It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns, where individual rights, acquired by war, are sacrificed for national purposes, the contract [treaty] making the sacrifice ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation."

5 U.S. at 110 (emphasis added).

It is noteworthy in understanding the decision that the property right in issue - a French ship captured as a prize - was acquired in the war which was the subject of the treaty. The property right itself, nevertheless, was clearly still recognized.*

* The Supreme Court, however, could not give compensation because the United States had not yet consented to suit in court. See, United States v. Klein, 80 U.S. 128, 144 (1872).

Accordingly, McCullough remains good law for the factual setting at bar. The District Court was therefore required to follow McCullough, notwithstanding the Court's opinion that the holding of McCullough that a judgment creates a vested right "can no longer be accepted ..." (709).

Insofar as there are lower court decisions contrary to McCullough such as those relied upon by the District Court (708-710), they must be rejected. Only the Supreme Court can decide when one of its prior decisions is no longer good law. E.g., Holmes v. Burr, 486 F.2d 55, 60 (9th Cir.), cert. denied, 414 U.S. 1116 (1973); Breakefield v. District of Columbia, 442 F.2d 1227, 1229-30 (D.C. Cir. 1970), cert. denied, 401 U.S. 909 (1971); Salerno v. American League, 429 F.2d 1003, 1005 (2d Cir. 1970), cert. denied, 400 U.S. 1001 (1971); Bank of New York v. Helvering, 132 F.2d 773, 775 (2d Cir. 1943) (L. Hand, J.).

Furthermore, even if this Court does not agree that judgments for money should generally be protected from new legislation, the August 2, 1976 judgment should be protected from the tampering of the State. In this regard, United States v. Klein, 80 U.S. (13 Wall.) 128 (1872) is especially apposite. There, the Supreme Court refused to apply a change in statutory law which purported to nullify judgments entered against the United States prior to the change. To do so, the Supreme Court

stated, would be "allowing one party to the controversy to decide it in its own favor." 80 U.S. at 146. In the instant case, if the State defendants' withdrawal of their consent to suit is allowed to stand, so as to void the August 2, 1976 judgment, they will be unilaterally deciding this controversy in violation of the principle of Klein.

POINT V

EVEN IF THE DECISION BELOW IS
AFFIRMED, THE CASE SHOULD BE
REMANDED FOR RECONSIDERATION
OF THE ORDER TO REFUND THE MONEY

On August 4, 1977 the District Court decided that it lacked jurisdiction to order the payment of money by the State defendants to the plaintiffs. By order of August 15, 1977 amended September 13, 1977, the Court required the plaintiffs to refund the money already paid over. If the decision below is affirmed as to the vacatur, the case should nevertheless be remanded for diminution of the relief granted, because the judge entered the refund order upon the incorrect belief that he was required by law to do so.

It is a long established principle of law that restitution is an equitable remedy granted only when justice requires. One of the more recent instances in which federal courts have so held is Thompson v. Washington, 551 F.2d 1316 (D.C. Cir. 1977). In that case the court refused to order restitution of rent increases which it found to have been illegally imposed. The court viewed the request for restitution as follows:

"The basic question is whether 'the money was obtained in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it,' and is 'no longer whether the law would put him in possession of the money

if the transaction were a new one.' Since restitution is not a matter of right, but is 'ex gratia, resting in the exercise of a sound discretion,' it lies within our authority to direct restitution in an amount less than the whole sum of the increased fares collected under the invalid order, or to deny it altogether, if compelling equitable considerations so dictate.'"

Id. at 1319 (quoting Williams v. Washington Metropolitan Area Transit Commission, 415 F.2d 922, 944 [D.C. Cir. 1968] [en banc], cert. denied, 393 U.S. 1081 [1969]) (emphasis supplied).

By letter dated August 11, 1977, and in argument before the court on the same day, the plaintiffs attempted to persuade Judge Lasker to refrain from ordering plaintiffs to make restitution (752-758). The discussion before the judge culminated in the following:

MR. NADEL: "Do I understand your Honor to rule that your decision with respect to repayment is not an exercise of discretion but you feel compelled by it?"

THE COURT: "I do feel compelled. If you can prove to me the contrary, I'll exercise my discretion."

(757-758)

There is one basic reason why the State defendants are not entitled to restitution. In its decision of July 29, 1976,* the District Court found that the State defendants acted "in blatant disregard" of federal law when they attempted to implement amendments to the State Plan before they had been

* Reaffirmed in its decision of August 4, 1977 (713).

approved by the Secretary. The State defendants have never seriously questioned the propriety of the ruling on pre-implementation approval. In short, the defendants now seek simply to evade the law through a resurrected sovereign immunity.

It is a fundamental canon of federal law that a State will obey the direction of a federal court even in the absence of a specific injunction. For example, in Wulff v. Singleton, 508 F.2d 1211 (8th Cir. 1974), rev'd on other grounds, 428 U.S. 106 (1976), the Court of Appeals declared a Missouri statute relating to abortions unconstitutional, but did not enter an injunction against the State. In so doing, the Court said:

"We assume that the state will abide by the ruling of this court and that medical assistance payments will be made on a non-disparate basis to those eligible needy persons who elect to carry their pregnancy to term or who receive therapeutic abortions and also to those who elect non-therapeutic abortions."

Id. at 1216.

The flouting of clear legal duties by high officers of a sovereign State, and their plain intention to evade the consequences by recouping the moneys paid pursuant to plaintiffs judgment, plainly call for an exercise of the District Court's equitable discretion. Thus, even if the vacatur is held proper, this case should be remanded to the

District Court with instructions to rescind its inequitable order of restitution.

CONCLUSION

For the foregoing reasons, the order of the District Court vacating its judgment of August 2, 1976, insofar as that judgment granted monetary relief, should be reversed in all respects.

Dated: New York, New York
November 7, 1977

Respectively submitted,

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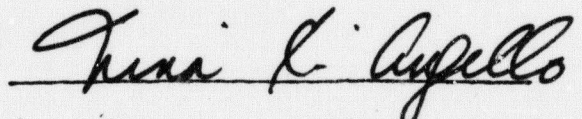
Nina C. Augello being duly sworn, deposes and states:

I am not a party to the action, am over 18 years of age and reside at Sunnyside, New York

On November 7, 1977 , I served the attached Brief for Plaintiffs- Appellants 2 copies upon the following attorney(s) at the address designated by him (them) for that purpose:

Covington & Burling, Esqs.
888 Sixteenth Street, N.W.
Washington D.C. 20006

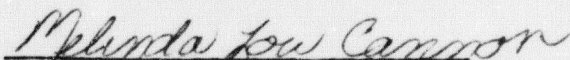
Said service was made by depositing a true copy of the attached Brief for Plaintiffs-Appellants 2 copies enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.



Sworn to before me this

Nina C. Augello

1st day of November 1977.



MELINDA LOU CANNON
NOTARY PUBLIC, State of New York
No. 31-4644145
Qualified in New York County
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